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IN THE

Supreme Court of the United States

CHAMBER OF COMMERCE OF THE UNITED STATES, NATIONAL ASSOCIATION OF MANUFACTURERS, AND ASSOCIATED BUILDERS AND CONTRACTORS, INC. *et al.*,
Appellants,

v.

FEDERAL ELECTION COMMISSION *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

OF THE "BUSINESS PLAINTIFFS,"

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QUESTIONS PRESENTED

1. Whether the "electioneering communications" provisions of the Bipartisan Campaign Reform Act ("BCRA") (§§ 201, 203, 204, and 311), violate the right of business corporations and those who wish to hear their independent speech and associate with them under the First Amendment.

2. Whether the "coordination" provisions of BCRA (§§ 202 and 214) violate the First Amendment rights of business corporations and those who wish to hear their speech and associate with them.

PARTIES TO THE PROCEEDINGS

The Appellants here, Plaintiffs in two of the eleven cases consolidated in the district court, represent the interests of American business and business corporations. The Appellants are the Chamber of Commerce of the United States, the National Association of Manufacturers, and the Associated Builders and Contractors, Inc. They are referred to herein as the "Business Plaintiffs."

- The Chamber of Commerce of the United States ("Chamber") is the world's largest not-for-profit business federation. Founded in 1912, the Chamber represents over 3,000,000 businesses and business associations. The Chamber is a corporation, as are many of its members and supporters, and it is exempt from taxation under § 501(c)(6) of the Internal Revenue Code.
- The National Association of Manufacturers ("NAM") is the oldest and largest broad-based industrial trade association in the United States. Its membership comprises 14,000 companies and 350 member associations, meaning that NAM represents about 18 million individuals. Like many trade associations, NAM is incorporated and is exempt from taxation under § 501(c)(6).
- The Associated Builders and Contractors, Inc. ("ABC") represents more than 23,000 contractors and related firms in the construction industry, both unionized and non-unionized, who share the view that work should be awarded and performed on the basis of merit, regardless of labor affiliation. ABC is funded primarily by membership dues and is exempt from taxation under § 501(c)(6).*

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* The Associated Builders and Contractors Political Action Committee (ABC PAC) and the U.S. Chamber Political Action Committee (U.S. Chamber PAC) will participate in this appeal as Appellees.

The Appellees here, who collectively were Defendants in the district court, fall into two categories: the Government Defendants, comprising the Federal Election Commission ("FEC"), the Federal Communications Commission, and the United States of America; and the Intervenor Defendants, comprising Senator John McCain; Senator Russell Feingold; Representative Christopher Shays; Representative Martin Meehan; Senator Olympia Snowe; and Senator James Jeffords. They are referred to collectively herein as Defendants.

CORPORATE DISCLOSURE STATEMENT

1. The Chamber of Commerce of the United States of America is a non-profit, non-stock corporation, exempt from taxation under I.R.C. § 501(c)(6).

2. The National Association of Manufacturers is a non-profit, non-stock corporation, exempt from taxation under I.R.C. § 501(c)(6).

3. The Associated Builders and Contractors, Inc. is a non-profit, non-stock corporation, exempt from taxation under I.R.C. § 501(c)(6).

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JURISDICTION

The district court entered judgment on May 2, 2003. Appellants filed timely notice of appeal on May 7, 2003. Appellants' notice of appeal is reprinted at App. 1a-2a. This Court has jurisdiction pursuant to § 403(a)(3) of BCRA.

PERTINENT CONSTITUTIONAL AND STATUTORY PROVISIONS

1. The Bipartisan Campaign Reform Act of 2002 ("BCRA"), Pub. L. No. 107-155, 116 Stat. 81 (2002), is reprinted at App. 22a-85a. The two provisions on which this statement focuses are the following:

Electioneering Communications

Section 201(a) of BCRA amends the Federal Election Campaign Act of 1971, 2 U.S.C. § 431 *et seq.* ("FECA") by adding the following to 2 U.S.C. § 434 as part of subsection (f):

> (3) ELECTIONEERING COMMUNICATIONS.—For purposes of this subsection—
>
> [PRIMARY DEFINITION]
>
> (A) IN GENERAL.—(i) The term "electioneering communication" means any broadcast, cable, or satellite communication which—
>
> (I) refers to a clearly identified candidate for Federal office;
>
> (II) is made within—

(aa) 60 days before a general, special, or runoff election for the office sought by the candidate; or

(bb) 30 days before a primary or preference election, or a convention or caucus of a political party that has authority to nominate a candidate, for the office sought by the candidate; and

(III) in the case of a communication which refers to a candidate for an office other than President or Vice President, is targeted to the relevant electorate.

[BACKUP DEFINITION]

(ii) If clause (i) is held to be constitutionally insufficient by final judicial decision to support the regulation provided herein, then the term "electioneering communication" means any broadcast, cable, or satellite communication which promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

Coordination

Section 214(a) of BCRA amended FECA, 2 U.S.C. § 441a(a)(7)(B), by inserting after existing clause (i) and before the former clause (ii)—redesignated as clause (iii)—the following new clause (ii):

(ii) expenditures made by any person (other than a candidate or candidate's authorized committee) in cooperation, consultation, or concert with, or at the request or suggestion of, a national, State, or local committee; and

Section 214(b), (c), and (d) of BCRA provide as follows:

(b) REPEAL OF CURRENT REGULATIONS.—The regulations on coordinated communications paid for by persons other than candidates, authorized committees of

candidates, and party committees adopted by the Federal Election Commission and published in the Federal Register at page 76138 of volume 65, Federal Register, on December 6, 2000, are repealed as of the date by which the Commission is required to promulgate new regulations under subsection (c) (as described in section 402(c)(1)).

(c) REGULATIONS BY THE FEDERAL ELECTION COMMISSION.—The Federal Election Commission shall promulgate new regulations on coordinated communications paid for by persons other than candidates, authorized committees of candidates, and party committees. The regulations shall not require agreement or formal collaboration to establish coordination. In addition to any subject determined by the Commission, the regulations shall address—

(1) payments for the republication of campaign materials;

(2) payments for the use of a common vendor;

(3) payments for communications directed or made by persons who previously served as an employee of a candidate or a political party; and

(4) payments for communications made by a person after substantial discussion about the communication with a candidate or a political party.

(d) MEANING OF CONTRIBUTION OR EXPENDITURE FOR THE PURPOSES OF SECTION 316.—Section 316(b)(2) of the Federal Election Campaign Act of 1971 (2 U.S.C. 441b(b)(2)) is amended by striking "shall include" and inserting "includes a contribution or expenditure, as those terms are defined in section 301, and also includes".

2. The First Amendment of the United States Constitution is reprinted at App. 21a.

INTRODUCTION

The success and vitality of American business, and of the corporations by which most of America's business is conducted, are critical to the welfare and happiness of the American people and to the security and stability of our nation. Corporations are primary employers, providing jobs, salaries, healthcare, retirement, and other benefits to most Americans; they produce much of our nation's goods and wealth; and their stock and other securities are central to retirement and investment plans. Business corporations are profoundly affected by federal policy, legislation, and executive activity on a wide range of issues, ranging from tort reform to taxes, intellectual property to import controls, employment standards to environmental protection. As a result, all Americans, including American voters and government officials, as well as workers, retirees, investors, and consumers, have a vital (if not always fully appreciated) interest in hearing what corporations have to say about the key issues of the day. At the same time, American corporations have a compelling need to communicate their views and concerns to Americans, including federal and political party officials. The First Amendment's fundamental rule that "Congress shall make no law . . . abridging the freedom of speech, or the right of the people . . . to petition the Government for a redress of grievances" protects the rights of corporations to speak on public issues and of Americans generally to hear that speech. And this protection has its fullest and most urgent application to speech at election time when Americans are most focused on policy issues and are assessing candidates in light of policy positions.

The Business Plaintiffs who join in this Jurisdictional Statement—the Chamber, NAM, and ABC—are three of the major incorporated associations through which American business and business corporations communicate with Americans and American government officials. Although the Business Plaintiffs do not always concur with one another on

matters of public policy, they speak with one voice—and in concord with such non-traditional allies as the AFL-CIO—in urging this Court to strike down portions of BCRA that directly violate their ability to speak, associate, and petition for policy purposes.

First, BCRA's so-called "electioneering communication" provisions should be reviewed and struck down in their entirety, and this Court should reaffirm its holdings that the "express advocacy" standard limits the scope of speech that may be restricted by campaign finance legislation, as well as fixing the clarity and precision with which any such standard must be defined. The district court properly rejected BCRA's Primary Definition of "electioneering" that would broadly forbid any corporation or union to broadcast any reference to a candidate during the 30 days before a federal nominating event or the 60 days before a federal election.[1] But it erroneously crafted an overbroad and vague Backup Definition under which corporations and unions may never spend treasury funds to broadcast any statement that may be deemed to "promote or support" or "attack or oppose" a candidate for federal office.

The Backup Definition, created by District Judge Leon with the concurrence of District Judge Kollar-Kotelly by deleting key narrowing language, was not and would not have been authorized by Congress. And, in his May 19, 2003, opinion on the stay applications, even Judge Leon now recognizes that the standard he crafted fails to provide the "guidance" that the First Amendment requires, though he hopes that the FEC someday may save it by adopting

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[1] In the case of candidates for Congress, a candidate could be mentioned if the speaker were assured that the broadcast could not be received by 50,000 persons in the relevant district or state. As to presidential candidates, the ban was nationwide and continued throughout the nominating year, beginning thirty days before the Iowa caucus in January.

clarifying regulations. But most fundamentally, by regulating speech that does not contain explicit words that expressly advocate the election or defeat of clearly identified candidates, the backup standard is constitutionally overbroad under this Court's holdings in *Buckley v. Valeo*, 424 U.S. 1 (1976), and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238 (1986) ("*MCFL*").

Second, the Court should review and strike down BCRA's overbroad and vague provision that speech may be deemed "coordinated" with a candidate, campaign, or political party, and hence condemned as an unlawful contribution, *even if there is no "agreement or formal collaboration" with the candidate concerning the speech.*

A narrow and clear definition of coordination is vital because the Business Plaintiffs and their policy allies—as well as many other participants in the federal legislative and policy process—meet almost daily with members of Congress and other federal and political party officials to develop policy initiatives and strategies, often on a long-term basis. Most members of Congress are candidates during most of their tenure, and many will become publicly identified with the issues they advance. If coordination can be alleged and found on something less than agreement, or if the standard otherwise is vague, the Business Plaintiffs will be forced to choose between associational activities that are essential to effective policy making and their core right to speak freely to the public on issues of public concern. This problem has bite right now because dealings with legislators, officers, or political parties today may foreclose speech in months to come. *Because the Business Plaintiffs must decide now and on an ongoing day-to-day and minute-to-minute basis which contacts and discussions to engage in, they are constitutionally entitled to a narrow and clear standard of coordination that requires an element of agreement.*

STATEMENT OF THE CASE

Legal Background

In *Buckley v. Valeo* this Court held that campaign finance regulation is constitutionally confined to a narrow category of speech that employs explicit words such as "vote for" or "support" to expressly advocate the election or defeat of clearly identified candidates. 424 U.S. at 43-44, 79-80. Any attempt by campaign finance statutes to reach beyond such explicit and express advocacy to less pointed discussions of issues and candidates is constitutionally overbroad and forbidden. *Id.* at 42. Also forbidden in this area of exceptional First Amendment sensitivity is any standard enforced by criminal sanction that fails to provide objective, bright-line guidance as to what is permitted and what is forbidden. *Id.* at 41. These holdings were expressly reaffirmed in *MCFL*, and have been uniformly understood by the U.S. courts of appeals to set First Amendment standards that limit federal and state campaign finance law and regulation.[2]

Those who value regulation above freedom repeatedly have asserted that *Buckley* and *MCFL* did not understand, and could not have intended, the speech that would be unregulated under the express advocacy standard. But *Buckley* stressed that it did not "naively underestimate the ingenuity and resourcefulness" of persons subject to campaign finance regulation. *Id.* at 45. It simply was not willing to open a large or ill-defined loophole in the core prohibitions of the First Amendment. Accordingly, *Buckley* made explicit that: "So long as persons and groups eschew expenditures that in express terms advocate the election or defeat of a clearly identified candidate, they are free to spend as much as they want to promote the candidate and his views." *Id.* at 45.

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[2] *See Chamber of Commerce of the United States v. Moore*, 288 F.3d 187 (5th Cir. 2002), *cert. denied*, 123 S. Ct. 536 (2002) (collecting authority).

Reassured by this Court's explicit recognition of their First Amendment right to independent advocacy, and limited in other avenues of speech and association, Americans of all points of view increasingly began to speak out about issues and candidates during the periodic intervals when public policy and officials are of greatest public interest – election season. Distressed by this robust and uninhibited public discussion, which often questioned the policies of incumbents and advanced the views of historically under funded challengers, Congress moved to suppress as much such activity as possible through the complex provisions of BCRA. This Statement focuses on two areas that BCRA regulates: "electioneering communications" and "coordination."

BCRA's Electioneering Communications Provisions

In BCRA Congress sought to expand the scope of regulated speech far beyond express advocacy to so-called "sham issue ads," by creating and defining a new concept—"electioneering communications." BCRA's Primary Definition of electioneering communication included any broadcast speech occurring 30 days before a nominating event or 60 days before an election that "refers to a clearly identified candidate for federal office," provided that if the communication refers to a congressional candidate, it "can be received by 50,000 or more persons" in the district or state to be represented. BCRA § 201(a). References to a candidate for President or Vice-President were included as electioneering communications without regard to who or how many persons could receive them. Other provisions of BCRA then restricted electioneering communications in various ways. BCRA §§ 201, 202, 204. For example, corporations and unions were flatly forbidden to spend their treasury funds for any electioneering communication. BCRA § 203.

The Primary Definition of electioneering communication was sweeping and Draconian. If an incumbent President who was seeking reelection moved to nationalize the steel mills or

seize the railroads or take over the nation's docks during an election year, the affected corporations and unions could not lawfully make any broadcast that referred to the President. Similarly, members of Congress would be shielded from any broadcast reference during much of any year in which they sought reelection or election to other federal office. And, ironically, during critical periods corporations could not have referred to the very bills that sought to curtail their First Amendment freedoms since the bills' popular names, "McCain-Feingold" and "Shays-Meehan," refer to candidates.

Aware that the Primary Definition was highly problematic, Congress took the extraordinary step of enacting a "Backup Definition." It provided that if the Primary Definition "is held to be constitutionally insufficient by final judicial decision," then electioneering communication means

> any broadcast, cable, or satellite communication which promotes or supports a candidate for office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate.

BCRA § 201(a). The Backup Definition explicitly rejects the express advocacy test adopted in *Buckley*. It does not depend on who receives the speech or when it occurs except to the extent that shifting circumstances may affect the judgment of whether the speech "promotes or supports" or "attacks or opposes" a candidate.

A majority of the three-judge court held that the Primary Definition was constitutionally overbroad and invalid. Per Curiam, Supp. App. 6sa. Judge Kollar-Kotelly disagreed. *Id.* Defendants have appealed that ruling and the Business Plaintiffs will defend it, but it is not the subject of this Statement.

The district court's treatment of the Backup Definition was more complex. Judge Henderson flatly rejected it; Judge

Kollar-Kotelly embraced it without separate comment; and Judge Leon initially held that part could be severed and saved so that any speech that "promotes or supports" or "attacks or opposes" a Federal candidate is restricted. Henderson, J., Supp. App. 362sa; Kollar-Kotelly, J., Supp. App. 885sa-86sa; Leon, J., Supp. App. 1154sa-66sa. However, on May 19, in ruling on various motions for stay, Judge Leon acknowledged that the words "promote," "support," "attack," and "oppose" in the Backup Definition do not provide sufficient "guidance" for speakers. *See* App. 19a. He said that the fault lay with the FEC, which had not adopted regulations to define those terms. *Id.*

BCRA's Coordination Provision

BCRA's second strategy for reducing speech about issues and candidates was to alter and expand FECA's provisions relating to "coordination." BCRA § 214(a) imposed a new substantive ban on coordination with political parties, as well as with candidates and campaigns. BCRA §§ 214(b) and (c) rejected a narrowing construction that a thoughtful U.S. District Court opinion had held to be constitutionally required, *FEC v. Christian Coalition*, 52 F. Supp. 2d 45 (D.D.C. 1999), and that the FEC had ratified by regulation. *See* 65 Fed. Reg. 76,146 (Dec. 6, 2000) (formerly codified at 11 C.F.R. § 100.23). The combined effect of the three clauses of § 214 was to resurrect and intensify the constitutional issues that had seemed to be well on their way to resolution.

A summary of the history of the coordination concept is useful. Under FECA, spending for speech that was "coordinated" with a candidate or campaign was deemed a regulated "contribution" to the campaign. 2 U.S.C. § 441a(a)(7)(B)(i). Some speakers, such as individuals and PACs, could make limited contributions and others, such as corporations and labor unions, were forbidden to make any contribution at all. 2 U.S.C. §§ 441a(a)(1), (2); 441b(a). However, the cost of creating and broadcasting a meaningful

ad typically would exceed most applicable contribution limits (excluding those of political parties). Thus, a charge of spending for coordinated speech translated directly into a charge of making unlawful criminal contributions.

Such charges have proved easy to make and hard to dispel. Our democratic system of government requires persons active in shaping public policy and legislation to have ongoing contact with members of Congress (most of whom are candidates for reelection), as well as other candidates for federal office and their political parties. For example, the Business Plaintiffs and thousands of similar groups had (and have) daily contacts with candidates or party representatives in a wide range of circumstances.

Because coordination was not narrowly, objectively, and precisely defined, persons and groups who sometimes speak on public issues faced a dilemma. They had to either (i) curtail communication and strategizing with those who shape public policy and legislation to preserve their right to speak freely, or (ii) curtail speech on issues or candidates that a policy critic, political opponent, or skeptical government enforcer might assert to be coordinated. Obviously, chilling contacts with federal officers interfered with fundamental First Amendment rights to petition, associate, and speak. And, chilling independent speech about public issues and candidates (subject to restrictions on express advocacy by corporations and labor unions) also strikes at the heart of the First Amendment. *See Buckley*, 424 U.S. at 41-47; *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 616 (1996).

Matters came to a head in the late 1990s with a series of FEC enforcement actions directed at supposedly coordinated speech. For example, the FEC launched a massive proceeding against a group of pro-business associations, including the Business Plaintiffs, known as The Coalition who had joined together to respond to a $35 million ad campaign by the AFL-CIO. *See generally* Henderson, J., Supp. App. 281sa-84sa.

After years of litigation, the U.S. district court for the District of Columbia in *Christian Coalition* ruled that, under the principles of *Buckley*, coordination had to be narrowly defined to require an element of agreement or formal coordination. The FEC elected not to appeal and, instead, promulgated regulations to codify the district court's constitutional holding. *See* 65 Fed. Reg. 76,146 (Dec. 6, 2000) (formerly codified at 11 C.F.R. § 100.23). Based on the narrowed and clarified definition of coordination, the FEC then terminated its proceeding against The Coalition, as well as a parallel proceeding against the AFL-CIO.[3]

BCRA sought to expand the restrictions on coordination in two ways. First, § 214(a) of BCRA added a new provision under which expenditures coordinated with a "national, State, or local committee of a political party, shall be considered contributions made to such party." Because other provisions of BCRA and FECA forbid corporate and labor union contributions to such political committees, this provision makes problematic any contacts, discussions, or information exchanges with representatives of political party committees, including most of the leadership in Congress.

Second, § 214(b) and (c) of BCRA repealed the FEC's coordination regulations that had been enacted to codify the constitutional holding that agreement is required, ordering the FEC to adopt new regulations that "shall not require agreement or formal collaboration to establish coordination."

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[3] The district court opinions of Judges Kollar-Kotelly and Leon contain findings dealing not with the question of whether the activities of The Coalition were coordinated with candidates but, instead, with whether the ads of The Coalition had the subjective purpose of influencing the election or defeat of candidates. Many of these findings rest on a report of the FEC General Counsel that was compiled without the participation of The Coalition, based on information that was not disclosed to The Coalition, and that was not itself adopted by the Commission. At an appropriate time, the Business Plaintiffs will respond to those findings, demonstrating that they are factually and legally unfounded.

However, the statutory provisions under which spending for speech that is coordinated with a candidate, campaign, and now with a party, is deemed a contribution remain self-enforcing, whether or not regulations are adopted. In fact, new FEC regulations took effect after this case had been submitted and, indeed, after the date that the district court had indicated its opinion would issue. Per Curiam, Supp. App. 155sa (discussing 60 day congressional review period). The new regulations do not require agreement or formal collaboration to establish coordination.

These changes raised two related but distinct issues: overbreadth and vagueness. All of the judges reached the merits of the overbreadth issue, but they differed on its resolution. Judge Henderson concluded that, in the absence of an agreement of some kind with a candidate, campaign, or party, there is no basis for depriving independent speech of its independent status. Henderson, J., Supp. App. 393sa-96sa. Thus, she held that the coordination provisions were overbroad. Henderson, J., Supp. App. 396sa. Judges Leon and Kollar-Kotelly, however, believed that other factors, such as a candidate's unilateral suggestion or concern expressed during consultation, would mean that a candidate would value independent speech to such an extent that it could be regulated as a contribution. Per Curiam, Supp. App. 141sa-43sa.

Finding the coordination provisions overbroad, Judge Henderson had no need to focus on the issue of vagueness. But Judges Leon and Kollar-Kotelly did have to deal with that issue. They agreed that the First Amendment compels a clear definition of coordination. However, they said that the FEC's new coordination regulations might provide such clarity, and they ruled that BCRA § 403(a) did not give them jurisdiction to examine those regulations. Per Curiam, Supp. App. 137sa-38sa, 155sa-56sa.[4] Thus, they held that the

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[4] The objection of Judges Leon and Kollar-Kotelly was that they lacked jurisdiction to evaluate the FEC coordination regulations. Accordingly,

vagueness issue was non-justiciable until the Business Plaintiffs first pursue a challenge to the FEC's new regulations before a single district judge under the Administrative Procedure Act. *Id.*

Judges Leon and Kollar-Kotelly did not explain why the jurisdiction over an entire "action" granted by BCRA § 403(a) does not permit the court to evaluate the meaning or validity of regulations that are offered as a defense to a claim that a provision of BCRA is overbroad or vague. They did not discuss the practical fact that, because BCRA § 403 gives the special court it creates the *exclusive* power to entertain constitutional challenges to the statute, a judge in an APA action could not even grant preliminary relief against the coordination provisions of the BCRA. Nor did they explain how their refusal to decide this issue conforms to BCRA § 403's command that the constitutional issues be resolved as quickly as possible. Judge Henderson, by contrast, correctly ruled that "piecemeal and delayed review of [Plaintiffs'] constitutional claims [concerning coordination] would defeat BCRA's mandate that judicial consideration of such claims 'shall be . . . expedite[d] to the greatest possible extent.'" Henderson, J., Supp. App. 396sa.

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they raised no issue about the adequacy of the briefing, nor did they request any supplemental briefing regarding the newly promulgated regulations. They also suggested that the FEC's advisory opinion process negated ripeness. Per Curiam, Supp. App. 138sa.

The FEC is allowed up to 60 days to respond to an advisory opinion request. 2 U.S.C. § 437f(a)(1). An expedited 20-day response time is provided for if the advisory opinion request is made within 60 days of an election. *Id.* § 437f(a)(2). However, this expedited process is only available to candidates, and unavailable to the entities that are regulated by the electioneering communication provision. At the same time, issue ads are crafted and revised to speak to the moment. It is not unusual for revisions to be made during final taping or editing within hours of airing the ads.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The two issues that the Business Plaintiffs present—the constitutionality of the judicially modified and expanded Backup Definition of electioneering communication and of the coordination provisions—lie at the heart of BCRA. The fundamental disagreements among the three district court judges as to both issues are powerful evidence that they are substantial, as is the district court's decision to stay all of those rulings pending review by this Court. Indeed, Congress demanded such a special court, provided for expedited litigation and appeal procedures, and adopted a Backup Definition of electioneering communication, precisely because it knew that BCRA was in serious tension with the constitutional holdings of this Court.

I. BCRA'S ATTEMPT TO RESTRICT BUSINESS CORPORATIONS' PUBLIC DISCUSSION OF ISSUES AND CANDIDATES THAT DOES NOT USE EXPLICIT WORDS TO EXPRESSLY ADVOCATE THE ELECTION OR DEFEAT OF A CLEARLY IDENTIFIED FEDERAL CANDIDATE VIOLATES THE FIRST AMENDMENT.

Both the Primary and Backup Definitions of electioneering communication seek to impose campaign finance regulation on independent speech that does *not* use explicit words to expressly advocate the election or defeat of a clearly identified federal candidate. Both definitions rest on the false premise that *Buckley* and *MCFL* imposed the express advocacy standard only to cure vagueness and not to protect issue advocacy from impermissible regulation. This is wishful thinking. In fact, both opinions held that, in our democracy, speech about issues and candidates cannot be suppressed unless its explicit wording expressly advocates an electoral outcome.

But even if Congress theoretically could enact a sufficiently clear alternative to the express advocacy standard,

the judicially modified and expanded Backup Definition crafted by Judge Leon with the acquiescence of Judge Kollar-Kotelly cannot stand. To begin with, there is no authority for the courts to broaden speech regulation to cure ambiguity; the practice is to narrow so that what is restricted is within Congress's intent. *See, e.g., United States v. Albertini*, 472 U.S. 675, 680 (1985) (narrowing must not "trench upon the legislative powers"); *CFTC v. Schor*, 478 U.S. 833, 841 (1986) (narrowing does not allow "perverting the purpose of a statute"). Certainly, broadening is not proper where, as here, Congress specifically indicated that one or the other of two alternative standards should be employed, and that is even truer where, as here, the judicially eliminated language was the heart of the provision. But beyond that, the broadening construction adopted by Judges Leon and Kollar-Kotelly does not solve the vagueness problem. To the contrary, Judge Leon himself recognized in his stay opinion that words such as "promote," "support," "attack," and "oppose" do not provide the "guidance" that the First Amendment requires. *See* App. 19a.

In sum, there are substantial reasons for rejecting the entire concept of regulating electioneering communications and for rejecting the broadening construction of the Backup Definition adopted by the district court here.

A. *Buckley* Holds That Campaign Finance Regulation Cannot Regulate Discussions Of Issues And Candidates That Do Not Contain Express Advocacy.

Buckley analyzed two statutory provisions for narrow tailoring and clarity. The first provision regulated speech "relative to" a candidate. 424 U.S. at 41-43. The Court found that other portions of the FECA narrowed the "relative to" phrase to speech "advocating the election or defeat of a candidate." *Id.* at 42. But that was not a constitutionally adequate standard, both because of vagueness and because

"the distinction between discussions of issues and candidates and advocacy of election or defeat of candidates may often dissolve in practical application," so that "discussions of issues and candidates" might be burdened. *Id.* *Buckley* held that these "constitutional deficiencies" could be avoided "only by reading [relative to] as limited to communications that include explicit words of advocacy of election or defeat of a candidate." *Id.* at 43-44. In other words, the express advocacy standard was adopted to avoid burdening what we now call "issue ads."

The second phrase analyzed by *Buckley* was "for the purpose of . . . influencing" the nomination or election of a candidate. *Id.* at 79. Like the first provision, this phrase had the "potential for encompassing both issue discussion and advocacy of a political result." *Id.* at 79. But *Buckley* already had ruled that speech short of express advocacy may not be subjected to campaign finance regulation. Accordingly, "[t]o insure that the reach of [the phrase] is not *impermissibly broad*," this Court construed it to reach only express advocacy. *Id.* at 79-80 (emphasis added).

MCFL confirmed that the express advocacy sets the permissible scope of speech restrictions in campaign finance statutes. Justice Brennan, who had some familiarity with *Buckley*, explained for the Court that the express advocacy standard was adopted "to avoid problems of overbreadth." 479 U.S. at 248. It achieved this objective, as well as curing vagueness, by preventing regulation of discussion of issues and candidates that did not employ explicit words of express advocacy. *Id.* at 248-49.

The U.S. courts of appeals uniformly have understood *Buckley* and *MCFL* to set the constitutional limits of campaign finance regulation, rather than merely one way to clarify particular statutory language. Most recently in *Chamber of Commerce of the United States v. Moore*, the Court of Appeals for the Fifth Circuit stressed "*Buckley*'s emphasis on

(1) the need for a bright-line rule demarcating the government's authority to regulate speech and (2) the need to ensure that regulation does not impinge on protected issue advocacy." 288 F.3d at 193.

Because the Primary and Backup Definitions, however construed, subject fully protected speech to such regulation, the entire electioneering communications concept should be struck down.

B. The Broadening Construction Imposed On The Backup Definition Of Electioneering Communication Was Not A Permissible Or Effective Cure For The Provision's Vagueness.

Once the district court majority struck down the Primary Definition of electioneering communication, they had to confront the Backup Definition, which encompassed speech that "promotes or supports a candidate for that office, or attacks or opposes a candidate for that office (regardless of whether the communication expressly advocates a vote for or against a candidate) and which also is suggestive of no plausible meaning other than an exhortation to vote for or against a specific candidate." BCRA § 201(a). Judge Leon agreed with Judge Henderson that, as written, the Backup Definition was invalid. Per Curiam, Supp. App. 6sa. However, he attributed this invalidity to vagueness in the final clause which narrowed the definition to speech which also is "suggestive of no plausible meaning other than an exhortation to vote" for or against a specific candidate. Leon, J., Supp. App. 1164sa-66sa. Judge Leon decided to sever that provision, thus *broadening* the Backup Definition to restrict all speech that "supports," "promotes," "opposes," or "attacks" a candidate for federal office. *Id.* That holding was mistaken on many grounds. First, as discussed above, there is no authority for curing vagueness by broadening a speech restriction Congress intended to be more narrow. Nor is it

permissible to sever the heart of a provision and leave peripheral matters standing. Yet this is what occurred here.

The backup definition originated with Senator Specter, who introduced it on the floor of the Senate. 147 Cong. Rec. S2704 (daily ed. Mar. 22, 2001). He explained that Congress should respect the constitutional holdings of the federal courts, and that the only federal appellate opinion to interpret *Buckley* to reach speech that lacked explicit words of advocacy was, in his view, the Ninth Circuit's opinion in *FEC v. Furgatch*, 807 F.2d 857 (9th Cir. 1987). *Id.* at S2706. He construed *Furgatch*, with some support from its text, to permit regulation of speech that lacked explicit words of express advocacy, but that suggested no other plausible meaning but an exhortation to vote in a particular way. *Id.* He said that his amendment "would take the Furgatch language and add it as an additional definition." *Id.* During the subsequent debates, he repeatedly referred to what became the Backup Definition as the *Furgatch* standard, *e.g.*, *id.* at S2707-08, S2710, S2712-13, and stressed his view that the proviso was what made the Backup Definition constitutionally precise. *Id.* This debate expressly addressed the issue of severability. Senator Spector explained; "we have Snow-Jeffords [the Primary Definition], or Furgatch, and if one of them measures up, then the statute survives." *Id.* at S2713. At no point did he or any other Senator ever place any weight on the "support," "promote," "oppose," or "attack" language that the district court proposes to impose as the entire definition or suggest that they desired any such standard in the absence of the *Furgatch* language.

Moreover, the severed judgment is even more vague than the full Backup Definition, requiring speakers to predict whether speech will be perceived to "support" or "oppose" a candidate. Consider, for example, the statement that "Candidate X voted to support the war in Iraq." In some circles that may be high praise; in other circles it may be a serious attack. Moreover, the perception of that statement might vary

sharply with rapidly developing external circumstances. On days when the matters in Iraq were going well, the statement might be perceived differently than on days when a severe sandstorm and concerns about extended supply lines dominated the news. The whole point of *Buckley*'s demand for explicit words of express advocacy was to provide an objective standard independent of circumstances or listener perceptions. Thus, in his opinion concerning a stay, Judge Leon belatedly acknowledged that his broadened Backup Definition does not provide the "guidance" that the First Amendment requires, though he expressed the hope that future FEC regulations might cure the problem. *See* App. 19a.

Judge Leon's suggestion that speakers avoid uncertainty by not referring to candidates, Leon, J., Supp. App. 1166sa, proposes the injury for which vagueness is condemned. No doubt this practical consideration was behind Judge Leon's belated recognition that, in fact, the modified Backup Definition is unconstitutionally vague and should not be given effect.

II. BCRA'S OVERBROAD AND VAGUE COORDINATION PROVISIONS ARE INFLICTING FIRST AMENDMENT HARM THAT MUST BE REMEDIED NOW.

The district court's divided ruling concerning BCRA's "coordination" provisions also presents a substantial issue for review. The dispute is not over the basic concept. No one questions that spending may be sufficiently coordinated with a candidate, campaign, or party, that it functions as a contribution and, hence, should count against contribution limits. *Buckley* so held. 424 U.S. at 46. Instead, the key dispute is over how broadly the coordination net may reach without impermissibly burdening core First Amendment rights to speak, petition, and associate. A related but distinct dispute is the extent to which BCRA § 403 permits an evaluation of FEC regulations that are offered in defense of a provision that

is alleged to be unconstitutionally vague. Defendants clearly perceived the coordination issue as substantial and directed a great deal of their discovery efforts to exploring when and how possible coordinating contacts occur.

All members of the district court agreed that the First Amendment requires that coordination be narrowly and precisely defined. As to whether the BCRA's definition is overbroad, the judges disagreed. Judge Henderson concluded that BCRA's coordination provisions were unconstitutionally overbroad because they permitted coordination to be established without the constitutionally essential element of agreement. Henderson, J., Supp. App. 393sa-94sa. She also held overbroad the provision that mere "consultation" without agreement could establish coordination. Hendeson, J., Supp. App. 394sa-96sa. Accordingly, she did not focus on the issue of vagueness.

Judges Leon and Kollar-Kotelly disagreed that the First Amendment requires that coordination be based on an element of agreement or that mere consultation could not be an adequate basis for finding coordination. Per Curiam, Supp. App. 138sa-43sa. They took the view that, if other factors showed that a candidate or political party highly valued independent speech, it could be regulated as a contribution even if there were no element of agreement. Per Curiam, Supp. App. 141sa-43sa. They further ruled that Plaintiffs' *vagueness* challenge was not justiciable since the FEC had promulgated regulations dealing with coordination and, in their view, BCRA § 403(a) did not give them jurisdiction to evaluate those regulations. Per Curiam, Supp. App. 137sa-38sa, 155sa-56sa.

Simply stated, Judge Henderson was right to reach and decide the matter by holding the coordination provisions to be unconstitutional. Only an element of agreement can convert independent speech into a contribution. Alternatively, BCRA § 403(a) gives the Court adequate authority to examine the

new FEC regulations and determine whether they are sufficient to cure the vagueness challenge.

A. Before BCRA, The FEC And The Courts Had Correctly Recognized That Preservation Of Core First Amendment Values Required That Coordination Be Construed To Require An Element Of Agreement.

As "issue ads" became more common during the 1990s, so did charges that the ads had been coordinated with candidates or campaigns so that spending on the ads would constitute unlawful contributions. Because only political parties had contribution limits high enough to finance meaningful speech —individuals were limited to $1,000 and corporations and labor unions were not allowed to contribute at all—such charges were potent weapons.

The basic problem was, and is, that in our democratic system, government and policy is developed through ongoing contact and cooperation with legislators, most of whom are candidates most of the time, executive officials serving the President and Vice-President who often are candidates, and political party representatives. Through this process public needs are identified, possible solutions are formulated, laws and regulations are drafted and critiqued, and advocacy strategies are devised and implemented. Ad hoc alliances and coalitions are formed to pursue shared objectives. The process can take years, or even decades, during which repeated elections will occur. This entire process involves speech, association, and petitioning activities that are at the core of the First Amendment.

Participants in this process also have and often exercise their right to speak publicly about issues and candidates. Not surprisingly, they often talk about the issues that they have been pursuing through the processes just described. And the natural and most effective time for such public speech is

when Americans otherwise are focused on issues of public policy and governance—during election campaigns.

The FECA provided that any speech made "in cooperation, consultation, or concert with, or at the request or suggestion of" a candidate or campaign was deemed coordinated. 2 U.S.C. § 441a(a)(7)(B)(i). For most of the 1990's, no judicial decision or FEC regulations imposed a narrowing construction, and FEC statements suggested an expansive reading. As a result, during the mid- to late-1990s, the FEC pursued a number of massive enforcement proceedings based on broad constructions of coordination.

One of these coordination-based proceedings was MUR 4624, in which the FEC targeted "The Coalition," an ad hoc group of pro-business interests, including the Business Plaintiffs, that raised and spent about $5 million during 1996 to produce and broadcast ads responding to a $35 million ad campaign of the AFL-CIO. *See generally* Henderson, J., Supp. App. 281sa-84sa. The complaint premised the charge of coordination on press reports that a Congressman had given a public speech saying that the business community should find some way to respond to the AFL-CIO and on the fact that representatives of the Business Plaintiffs and similar groups met regularly with members of Congress, including the one who gave the speech, in the Thursday Group to strategize in support of the legislative agenda popularly known as the Contract with America. In that proceeding, hundreds of thousands of sensitive documents were demanded, dozens of intrusive depositions were taken, and significant legal expenses were incurred.

In *Colorado Republican Federal Campaign Committee v. FEC*, this Court said that "simply calling an independent expenditure a 'coordinated expenditure' cannot (for constitutional purposes) make it one," 518 U.S. at 621-22, and that speech *not* made "pursuant to any particular or general understanding with a candidate" was *not* coordinated, *id.* U.S. at 614, though the latter point was not developed. The

constitutional issues raised by FECA's broad coordination provision first received full judicial consideration in *FEC v. Christian Coalition*. Drawing on *Buckley* and related cases, the district court held that the right to spend money on one's own speech could be classified and limited as a contribution only if there was sufficient agreement with a candidate or campaign that the speech actually functioned as a contribution. 52 F. Supp. 2d at 83-92.

The FEC acquiesced in the *Christian Coalition* narrowing construction and issued regulations to codify it. 65 Fed. Reg. 76,146 (Dec. 6, 2000) (formerly codified at 11 C.F.R. § 100.23). Then, because neither the complaint against The Coalition nor its massive investigation disclosed any agreement between The Coalition and any candidate or campaign, the FEC dismissed the complaint, closing that proceeding and other similar proceedings. The burdens of the investigation, including the intrusiveness of the inquiry as well as the cost and disruption, had led members to withdraw their support, and The Coalition closed down. Henderson, J., Supp. App. 284sa. However, the FEC's recognition that an element of agreement is necessary to transform independent speech into a contribution was a useful and important step in narrowing and clarifying the coordination provisions.

B. By Rejecting The Constitutionally Mandated Requirement That Some Agreement Exist To Justify Treating Otherwise Independent Spending As A Contribution, BCRA's Coordination Provisions Violate The First Amendment.

BCRA §§ 202 and 214 attempt to classify spending on independent speech, which cannot constitutionally be limited, as contributions, which are tightly limited, in the absence of the agreement necessary to justify that result. This broadened definition of coordination applies both to FECA's limitation on candidate contributions and BCRA's new limitation on

coordination with political parties, even where no candidate is involved.[5]

Section 214(a) pointedly defines "coordination" with a political party by using the same language—"cooperation, consultation, or concert with, or at the request or suggestion of"—that FECA had used with respect to candidates and campaigns and that *Christian Coalition* had held unconstitutionally overbroad and vague. To underscore the insistence on the broad statutory definition of coordination, rather than the narrowing construction adopted in *Christian Coalition* and written into the FEC's regulations, § 214(b) repeals those regulations. And lest there be any thought that the broad statutory definition might again be construed to require agreement, § 214(c) specifies that any new FEC regulations "shall not require agreement or formal collaboration to establish coordination."

Settled principles require that these related clauses be understood as a whole. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 51 (1987). Taken together, they reject the narrowing construction of "coordination" adopted by *Christian Coalition* and the FEC regulations based on that construction and reaffirm that coordination extends to any speech "in cooperation, consultation, or concert with, or at the request or suggestion of" a candidate or campaign, *whether or not there is any agreement*. Moreover, because § 214(c) also rules out

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[5] Section 202(a) provides that spending on an "electioneering communication" may be coordinated. The reason for so specifying is that it is obvious that not all spending coordinated with a candidate is the functional equivalent of a contribution. For example, a member of Congress who technically is a candidate may support a local library fund, and other fund supporters may coordinate speech saying "Give to the Library." There is a strong view, most forcefully advocated by FEC Commissioner Smith, that coordinated spending on speech may be deemed a contribution to a campaign only if the speech contains express advocacy. Statement For The Record By Commissioner Bradley A. Smith In FEC MUR 4624 (Nov. 6, 2001) (available from the FEC's public file).

"*formal* collaboration" (emphasis added) as a standard, its failure to apply any similar limiting term to "agreement" shows that the term is used comprehensively. No element of agreement, formal or informal, express or implied, can be required. Instead, the standard is acting in "cooperation, consultation, or concert with," or at "the request or suggestion of" a candidate, campaign, or political party.

All three members of the district court reached the overbreadth issue. The majority concluded that excluding agreement did not create overbreadth. Per Curiam, Supp. App. 138sa-43sa. However, Judge Henderson correctly concluded that BCRA's overbreadth violates the First Amendment. Henderson, J., Supp. App. 390sa (BCRA's coordination provisions are overbroad because "many of the expenditures BCRA defines as 'coordinated' are not 'disguised contributions'"). If speech is not the product of some agreement with a candidate, campaign, or party, then it is not functionally a contribution. The speech is independent and cannot constitutionally be limited. *Id.* Nor can mere "consultation," so long as it does not rise to the level of agreement, convert fully protected independent speech into a functional contribution. Henderson, J., Supp. App. 387sa-91sa. The same reasoning would apply to a mere "suggestion" that does not lead to some element of agreement. Because of this plain and congressionally mandated overbreadth without regard to vagueness, BCRA's coordination provisions are unconstitutional.

C. The Vagueness Challenge Is Justiciable.

Because First Amendment values are so important, the courts strain to find that arguable First Amendment claims are justiciable. 13A Charles A. Wright et al., *Federal Practice and Procedure* § 3532.3 (2d ed. 1984). That policy applies with special force where, as here, the violations involve the basic processes by which our democracy functions, our laws are formed, and our leaders are selected. Recognizing as much, BCRA § 403(a) directs the court to "expedite to the

greatest possible extent" the resolution of any action "to challenge the constitutionality of any provision" of BCRA. Thus, if such a challenge meets the constitutional minima for exercise of the judicial power, it should be held justiciable.

The basic constitutional requirement for exercise of the judicial power is a genuine case or controversy presented by a plaintiff with standing. *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 771 (2000). Those requirements are met here. Moreover, to the extent that prudential ripeness concerns apply here, a pre-enforcement challenge to a statute is ripe where it is justified by the "hardship to the parties of withholding [judicial] consideration," or where further agency action will not affect the dispositive statutory analysis. *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). In this case an injured Plaintiff presents a clear controversy, considerations of hardship mandate a decision now, and Defendants have not shown that the FEC regulations cure the vagueness of the coordination provision.

1. *The Business Plaintiffs And Thousands Of Other Similar Entities Are Suffering Immediate And Ongoing First Amendment Injury.*

BCRA's vague and overbroad definition of coordination has bite right now because the Business Plaintiffs and thousands of similar entities deal with members of Congress, government officials, and representatives of political parties on a daily basis. Henderson, J., Supp. App. 395sa. Similarly, the Business Plaintiffs and other similar entities regularly participate in funding independent speech on issues of concern to them. Leon, J., Supp. App. 1363sa-77sa (examples of "genuine" issue ads during pre-election periods). As each potential contact with a candidate, campaign, or party official arises, the Business Plaintiffs must decide whether to proceed with the contact and accept resulting limits on future speech

or to decline the contact to preserve future speech rights. Either way, core First Amendment rights are at stake.

Judges Leon and Kollar-Kotelly do not deny the dilemma but say that they see no reason why it is more acute now than before. Per Curiam, Supp. App. 135sa-36sa. In part they are right. The situation created by BCRA does resemble the situation during the 1990s, though it is worse because (i) the concept of coordination now also applies to political parties and "electioneering communications," and (ii) the Business Plaintiffs then at least had the argument that agreement is an essential element of coordination, an argument BCRA rejects. *More fundamentally, however, the vague and overbroad standard that prevailed in the 1990s caused serious injury to the Business Plaintiffs, and the threat of similar injury is chilling First Amendment activity now.* Henderson, J., Supp. App. 395sa; Leon, J., Supp. App. 1363sa-77sa (examples of ongoing issue speech).

2. *The FEC's Regulations Do Not Prevent Review.*

Nearly 10 months after the complaints were filed, the FEC issued regulations defining BCRA's concept of "coordination." Per Curiam, Supp. App. 155sa. Nearly 2 months after the case was submitted—and after the Court had indicated it would issue its ruling—those regulations became final. *Id.* District Judges Leon and Kollar-Kotelly then ruled that the vagueness challenges were non-justiciable because the regulations theoretically might have provided a cure and BCRA § 403(a) did not allow them to evaluate the regulations to determine whether or not that had occurred. Per Curiam, Supp. App. 137sa-38sa, 155sa-56sa. That was error.

Defendants' claim that the new regulations cure the obvious facial vagueness of the coordination provisions is a matter of defense that can and should be resolved in this action. BCRA § 403(a) gives the three-judge district court jurisdiction of any "action" brought to "challenge the con-

stitutionality of any provision" of BCRA. Surely the power to decide such an action includes the power to evaluate defenses offered in opposition to a constitutional challenge to a provision of BCRA. Indeed, under *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966), a grant of jurisdiction generally encompasses all logically related components of a dispute.

Thus, there is no basis for the ruling that the regulations can only be evaluated in a proceeding before a single judge under the Administrative Procedure Act. Moreover, such a proceeding would be seriously impractical. Because BCRA § 403(a) assigns exclusive jurisdiction over such issues to a three-judge court, a single judge court could not consider the validity of the statute. Thus, the validity of the regulations would have to be fully litigated first, and then a separate action would have to be brought to challenge the statute. What would happen if new regulations were adopted while the second statutory challenge was under way is anyone's guess, but clearly the situation would be unfair and impractical. More importantly, it is contrary to the command of BCRA § 403(a) that constitutional challenges to the statute be resolved swiftly. Henderson, J., Supp. App. 397sa.[6]

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[6] The Per Curiam Opinion's reliance on *Martin Tractor Co. v. FEC*, 627 F.2d 375 (D.C. Cir. 1980), is unfounded. Per Curiam, Supp. App. 150sa-55sa. There a corporation and its PAC challenged as vague a provision permitting them to "solicit" hourly employees only twice a year. 627 F.2d at 382. Plaintiffs alleged "that their behavior has thus far conformed to the statutory mandate [and] make no allegation of an intention imminent or otherwise to violate the statute, and the [FEC had] no cause to commence enforcement, nor even to threaten enforcement, of the challenged statutory provisions." *Id.* at 382-83. Instead, the case presented a long-term issue with no present impact. On those facts, the court concluded that, because there was no "urgency of decision," *id.* at 388, and the FEC's advisory opinion process "offer[ed] a prompt means of resolving doubts with respect to the statute's reach," *id.* at 384, that could "be pursued at little risk to the rights asserted," *id.* at 386, the

3. *The Vagueness Of The Coordination Provisions Has Not Been Cured.*

Buckley holds that restrictions on political speech concerning public issues and candidates that threaten criminal penalties must be exceptionally clear, precise, and objective. 424 U.S. at 41. The express advocacy standard illustrates what is required. *Id.* at 39-40. BCRA's definition of coordinated speech as speech made "in cooperation, consultation, or concert with, or at the request or suggestion of" a candidate, campaign, or party falls woefully short of the required standard.

Even the quickest glance at the FEC's coordination provisions reveals that the vagueness of the statute has not been cured, or even seriously addressed, in critical respects. For example, 11 C.F.R. § 109.21(d)(1) continues to include as "coordinated" any independent speech "at the request or suggestion of a candidate or an authorized committee, political party committee, or agent."[7] And 11 C.F.R. § 109.21(e) emphasizes that this standard must not be understood to require any element of agreement. Accordingly, so far as appears, whenever a candidate, campaign, or political party expresses any desire or suggestion relating to possible independent speech, that speech then becomes problematic. Surely something much narrower was intended, but that simply demonstrates the vagueness of the regulation.

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doctrine of ripeness counseled "against constitutional adjudication on a barren record." *Id.* at 385. Here, by contrast, the record is clear that the Business Plaintiffs and many similar entities engage in a wide variety of contacts with legislators and other federal and party officials that, if not properly structured and limited, will preclude independent issue advocacy in the future. Thus, the problem is urgent, the advisory process offers no plausible assistance, and the case is before this Court on a full record and under a statutory mandate of prompt resolution.

[7] The speech also must satisfy certain vague and overbroad content standards, such as constituting an "electioneering message." 11 C.F.R. § 109.21(a)(2).

Importantly, BCRA's coordination provisions are self-enforcing. Whether or not valid regulations exist, if a Business Plaintiff makes an expenditure that is "coordinated," a corporate contribution results, a political opponent may file a complaint and, if the FEC does not pursue the matter with satisfactory vigor, may seek judicial review. While *compliance* with a regulation is a defense, 2 U.S.C. § 438(e), violation of a vague regulation leaves the speaker exposed to full penalties.

Because the Business Plaintiffs and thousands of similar entities interact with federal legislators, officials, and political parties on almost a daily basis, these vague and self-executing provisions, backed up by criminal sanctions, force them to hedge and trim and steer clear of fully protected activity. This is unconstitutional.

CONCLUSION

For the foregoing reasons, the Court should note probable jurisdiction.

Respectfully Submitted,

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